Petition

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

JOHN R. IMMER,

Petitioner,

v.

PUERTO RICO MARITIME SHIPPING AUTHORITY, *ET AL.*,

Respondents,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Should a judge recuse herself when she has prior knowledge of the facts, is a former Assistant Attorney General who handled pre-litigation proceedings and owes her appointment to counsel for Respondents.

2. Should a Review Panel recuse itself when it prejudges the issues and creates the appearance of a conspiracy to corrupt the Federal Court?

3. Whether, when the Attorney General of the United States combines with Respondents to support a shipping monopoly and lends his support to an apparent scheme to corrupt the Federal Courts, this is undue interference of the Judiciary by the Executive Department.

LISTING OF PARTIES

Respondents in this case are:

Puerto Rico Maritime Shipping Authority ("PRMSA"),

Puerto Rico Ports Authority ("PRPA"),

R. J. Reynolds Industries, Inc. ("Reynolds"),

McLean Industries, Inc. ("McLean"),

Sea-Land Service, Inc. ("Sea-Land"),

T.K.M. Corporation ("TKM"),

Gulf Puerto Rico Lines, Inc. ("GPRL"),

Sun Shipbuilding and Dry Dock Co. ("Sun Ship"),

Transamerican Trailer Transport, Inc. ("TTT"),

American Union Transport, Inc. ("AUT"),

Trans Ocean Transportation Executive Management, Inc. ("TOTEM"), and

The Attorney General of the United States (Attorney General).

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JURISDICTION

On August 17, 1981, Petitioner filed motions before the United States Court of Appeals, District of Columbia Circuit, under 28 U.S.C. § 2106, the "Fraud on the Court" Rule, and 28 U.S.C. § 455. These were dismissed without opinion or comment on October 2, 1981. Petitioner's Application for Rehearing, or in the Alternative Rehearing *En Banc* was denied on November 12,

1981, likewise without comment. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The Petition was filed within ninety days of the order of the District of Columbia Circuit denying a rehearing.

STATUTORY PROVISIONS INVOLVED

1. 28 U.S.C. § 2106. *Determination.*

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances. June 25, 1948, c. 664, 62 Stat. 963.

2. 28 U.S.C. § 455. *Recusal of Judges.*

> Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal or other proceeding therein.
>
> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(3) Where he has served in governmental employment and in such capacity participated as counsel, advisor or expressed an opinion concerning the merits of the particular case in controversy;

3. 28 C.P.R. § 50.6. ***Antitrust Division Business Review Procedure.***

Although the Department of Justice is not authorized to give advisory opinions to private parties, for several decades the Antitrust Division has been willing in certain circumstances to review proposed business conduct and state its enforcement intentions. This originated with a "railroad release" procedure under which the Division would forego the initiation of criminal antitrust proceedings. The procedure was subsequently expanded to encompass a "merger clearance" procedure under which the Division would state its present enforcement intention with respect to a merger or acquisition; and the Department issued a written statement entitled "Business Review Procedure." That statement has been revised several times.

1. A request for a business review letter must be submitted in writing to the Assistant Attorney General, Antitrust Division, Department of Justice, Washington, D.C. 20530.

2. The Division will consider only requests with respect to proposed business conduct, which may involve either domestic or foreign commerce.

3. The Division may, in its discretion, refuse to consider a request.

4. A business review letter shall have no application to any party which does not join in the request therefor.

5. The requesting parties are under an affirmative obligation to make full and true disclosure with respect to the business conduct for which review is requested. Each request must be accompanied by all relevant data including background information, complete copies of all operative documents and detailed statements of all collateral oral understandings, if any. All parties requesting the review letter must provide the Division with whatever additional information or documents the Division may thereafter request in order to review the matter. Such additional information, if furnished orally, shall be promptly confirmed in writing. In connection with any request for review the Division will also conduct whatever independent investigation it believes is appropriate.

6. No oral clearance, release or other statement purporting to bind the enforcement discretion of the Division may be given. The requesting party may rely upon only a written business review letter signed by the Assistant Attorney General in charge of the Antitrust Division or his delegate.

* * *

Note: Items 7 to 11 are not reproduced. (28 U.S.C. 509 and 510; 5 U.S.C. 301) [42 F.R. 11831, Mar. 1, 1977].

STATEMENT OF THE CASE

In brief outline the undisputed facts are as follows:

1. On July 22, 1974, the Antitrust Division of the Department of Justice issued a Business Review Letter saying it had no intent to prosecute if the Puerto Rico government set up a shipping monopoly of all the containership services between the mainland United States and Puerto Rico, which would be the second largest shipping company in the United States (Appendix D).

2. The Antitrust Division did not ask for a copy of Puerto Rico Law No. 62 (1974) signed by the governor on June 10, 1974, which established the Puerto Rico Maritime Shipping Authority (PRMSA) authorizing it to conduct foreign and domestic shipping to Puerto Rico "in whole or in part."

3. The Antitrust Division did not ask for a copy of the order of the Board of Directors of PRMSA of July 9, 1974, awarding the managing and operating contract of the new shipping monopoly to Sea-Land Service, Inc., the nation's largest container shipping company. It never required a copy of this management agreement.

4. On June 7, 1974, the Antitrust Division demanded proof of Petitioner's charges of conspiracy to create a monopoly. When Petitioner presented on November 15, 1977, a 106-page formal complaint against the Secretary of Commerce and Respondents it was dismissed without investigation. At this time the Antitrust Division affirmed its support of the shipping monopoly (Appendix E).

5. Concern of Petitioner's charges of monopoly on the important Puerto Rico trade route elicited letters from Senators Allen and Nunn and from Congressmen Ginn, of Georgia, Pepper and Rogers of Florida and Edwards of Alabama. All of these inquiries were handled by Mrs. Patricia Wald, then Assistant Attorney General for Congressional Affairs. The Secretary of Commerce, against whom the complaint was lodged, was Mrs. Juanita Kreps, on leave of absence as a director of R. J. Reynolds Industries, Inc., one of the Respondents of this case.

6. Petitioner filed a complaint against Respondents in the United States District Court for the District of Columbia on March 13, 1978. This was dismissed without discovery on April 19, 1979. Petitioner appealed

to the Court of Appeals and filed an Opening Brief on August 6, 1979.

7. The Review Panel of the Court of Appeals consisted of Judges Bazelon, Wilkey and Wald. Judge Wald was the former Assistant Attorney General for Legislative Affairs who had been involved with Petitioner's complaint before the Office of the Attorney General in 1977 (Appendices F & G). Judge Bazelon was the former Chief Judge of the District of Columbia Circuit and was also chairman of the Advisory Committee of the Model School Division of the District of Columbia public schools in 1965 (Appendix I).

8. The order was issued on February 13, 1980, and Petitioner on the day of oral argument, February 14, 1980, was given a copy advising him that the Review Panel had, *sua sponte*, ordered the Attorney General of the United States to enter the case with an *amicus curiae* brief although no federal agency was involved in the case and no federal law was threatened (Appendix C).

9. Not known to Petitioner at that time was the fact that Judge Wald's confirmation by the Senate Judiciary Committee in 1979 had been supported by a letter (Appendix H) signed by Charles R. Work and Charles T. Duncan, partners in the law firm of Peabody, Rivlin, Lambert & Meyers, which firm appeared before the Review Panel (and this Court) as counsel for PRMSA, PRPA, PRMMI, TTT and TKM, Respondents in this case.

10. Not known to Petitioner at that time was the fact that Judge Wald had been the Assistant Attorney for Legislative Affairs in 1977 and as such had had an active role in these pre-litigation proceedings including the handling of inquiries from various congressmen and senators relating to Petitioner's complaint (Appendices F & G).

REASONS FOR GRANTING THE WRIT

The integrity of the federal court system is involved in this petition. The specific questions raised are:

1. Can a federal judge of the appellate court evade recusing herself when she had prior knowledge of the facts of the case, as an Assistant Attorney General of the United States handled numerous inquiries relating to the case and whose confirmation as a judge was actively supported by counsel for Respondents?

2. Where the Review Panel has prejudged the issues of the case by ordering in, *sua sponte,* just prior to oral argument, the Attorney General of the United States to provide an *amicus curiae* brief where the position of the Attorney General was known, thereby creating the appearance of a conspiracy to commit fraud on the court, should the Review Panel be recused and the case heard by an uncontaminated Panel?

3. Where the Attorney General of the United States supports the civil cause of respondents, issues a Business Review Letter without requiring copies of the agreements and authorizing acts involved and is involved in an apparent conspiracy to corrupt the federal court, should the decision of the lower court be vacated and the case remanded to a Federal District Court in a different circuit to provide a judgment on the issues by an uncontaminated court?

Any one of the above reflects on the integrity of the court and the impression that the court is strictly an unbiased and impartial judge of the issues brought before it. The facts upon which this petition is based have been widely distributed throughout the shipping and distributive industries and have never been questioned by Respondents. The summary dismissal of these motions

increases the general impression that there is a conspiracy involved and that the Court has a strong reason for not permitting the case to be heard on its merits by another court.

I.

SHOULD A JUDGE RECUSE HERSELF WHEN SHE HAS PRIOR KNOWLEDGE OF THE FACTS, IS A FORMER ASSISTANT ATTORNEY GENERAL AND OWES HER APPOINTMENT TO COUNSEL FOR RESPONDENTS?

The outstanding aspect of 28 U.S.C. § 455 is that it places responsibility upon the judges themselves for preserving the appearance of justice. As the Supreme Court said in *Offutt v. United States,* 348 U.S. 11, 14, 75 S. Ct. 11, 13, 99 L. Ed. 11 (1954) [as cited in *Mitchell v. Sirica,* D.C.C.A. 1974, 502 F.2d 375]: "justice must satisfy the appearance of justice."

A litigant has a constitutional right not to be tried before a judge who is biased against him. *Milligan v. Stone,* 424 F. Supp. 1088 (S.D. Calif. 1976). Where there is an appearance of partiality recusal is generally required. *Smith v. Pepsico, Inc.,* 434 F. Supp. 524 (S.D. Fla. 1977); *see also United States v. Hanrahan,* 248 F. Supp. 471 (D.C.D.C. 1965).

The due process guarantee of a fair trial contains in its core the principle that every litigant is entitled to nothing less than the cold neutrality of an impartial judge. West's F.S.A. § 38.10 cited in *Pistorino v. Ferguson,* 386 S.2d 65 (Fla. App. 1980).

Pistorino v. Ferguson, supra, went further:

> The statute allows a party to bring about the disqualification of a judge on the basis of his belief that he will not receive a fair trial. When the

> requirements of the statute are met, the necessity of proving the judge is in fact prejudiced is obviated. But where the record, as here, reflects that the judge is in fact prejudiced, the necessity of utilizing the statute is obviated.
>
> Accordingly, we grant the writ for prohibition. We assume it will not be necessary to issue the writ. 386 S.2d 67.

Although the statute referred to is a Florida statute, the standard for the impartiality of the judges should be as high or higher for the federal court system. At least the charges should be considered by an unbiased court.

The essence of the test under Section 455 is the appearance before a "reasonable man". This issue was set forth with particular clarity in *In the Matter of Searches Conducted on March 5, 1980,* 497 F. Supp. 1283 (E.D. Wisc. 1980) at p. 1291:

> The standard under 455(a) is whether a reasonable person knowing all the facts and looking at the circumstances at the present time would question the impartiality of the Court.

In case of any doubt disqualification should follow:

> Under Section 455(a), as amended, if there is any question of impropriety, a judge should exercise his discretion in favor of disqualification. *Id.; Potashnick v. Port City Constr.,* 609 F.2d 1101, 1112 (5th Cir. 1980).

Within the District of Columbia Circuit the Court of Appeals has stated its position that the "Appearance of impropriety" standard for recusal of a judge summons a disqualification, not merely when a judge's participation might somehow be questioned but when it may reasonably be questioned. *United States v. Haldeman,* 559 F.2d 31, 181 U.S. App. D.C. 254, *cert. den.*;

Ehrlichman v. United States, 97 S. Ct. 2641, 431 U.S. 933, 53 L. Ed. 2d 250; and *Mitchell v. United States,* 97 S. Ct. 2641, 431 U.S. 933, 53 L. Ed. 2d 250.

Recusal Required Under 28 U.S.C. § 455(a).

> Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might be questioned. 28 U.S.C. § 455(a).

Even with no element of conspiracy Judge Wald should have recused herself. She knew at the time of oral argument, although Appellants did not, that her former superior had taken a position on the issues of the case and that she could depend upon the Attorney General to take the position he did in his *amicus curiae* brief which was in strong support of Respondents. Such situations have arisen before and, in fact, this was the subject of an extensive article in 56 Yale Law Review 605 (1947), *Disqualification of Judges,* by John P. Frank.

Professor Frank said at p. 622:

> When the judge has had prior contact with both the client and the case, disqualification is universal for the obvious, but seldom articulated reason that a judge would seldom have an open mind under such circumstances, and to sit would invite charges of corruption.

The article continued at pp. 635-636:

> The fastest growth today [in disqualification] is in connection with the relationship of judge to attorney, and there it may be noted that the trend has turned toward more general disqualification.

Judge Wald was also indebted to the legal firm which appeared before her in defense of Appellees and no reasonable man would doubt but that she was aware of

the connection of the firm, given the avowal of close professional relationship to the two partners of the firm contained in the letter (Appendix H). Her confirmation as a judge was hotly contested before the Senate Judiciary Committee. In such circumstances the supporting letter presented by Messrs. Work and Duncan on her behalf could have been the critical element of support which resulted in her approval by the Committee. Her debt to these two men was not small.

Mrs. Wald had been involved with Petitioner's 106-page complaint before the Office of the Attorney General in 1977. As there was a number of inquiries made on Petitioner's behalf by various Senators and Representatives, the involvement was more than casual. As the complaint was mainly against the Maritime Administration which is under the Secretary of Commerce, there must have been contact with the Office of the Secretary and it is reasonable to assume that the Secretary herself (as a director of Reynolds Industries on temporary leave) would have had more than a casual interest in a charge of such magnitude. Certainly, she had the capability of influencing the position of the Attorney General in this matter.

On this basis alone, Petitioner has a reasonable basis for questioning the impartiality of Judge Wald and asking the Supreme Court to remand the case to a court where there is no prior knowledge of the facts or contacts with respondents in this case.

Recusal Required Under 28 U.S.C. § 455(b)(1).

> He shall also disqualify himself . . . where he has personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding; . . . 28 U.S.C. § 455(b)(1).

In *W. Clay Jackson Enterprises, Inc. v. Greyhound Leasing & Fin. Corp.*, 467 F. Supp. 801, 803, the Court said that where the judge had other knowledge of disputed evidentiary facts recusal could not be waived by any party. *S.C.A. Services, Inc. v. Morgan*, 557 F.2d 110; *cf. Bradley v. Millikin*, 426 F. Supp. 929 (D.C. Mich. 1977). To the same effect was the article, *Disqualification of Judges for Bias in the Federal Courts*, 79 Harvard L. Rev., 1435, 1452 (1966):

> The objection that a judge has acquired prejudicial knowledge outside the courtroom is generally sufficient for disqualification . . . . See *McFadden v. United States*, 63 F.2d 111 (7th Cir. 1933).

Another decision said that prior knowledge of facts may be ground for disqualification of the judge. *Roberson v. United States*, C.A. Ala. 1957, 249 F.2d 737, 72 A.L.R. 434, *cert. den.* 78 S. Ct. 704, 356 U.S. 919, 2 L. Ed. 2d 715.

With the total involvement of Mrs. Wald with Petitioner's complaint in 1977 it must be admitted that she was subjected to the facts of the case and the legal arguments involved. No reasonable man could say that Judge Wald did not come to the case in her capacity as an Appellate Judge with a considerable knowledge of the facts and with a strong prejudice arising out of her loyalty to her *alma mater*, the Department of Justice. That prejudice was attested to by the *amicus curiae* brief of the Attorney General.

Recusal Required Under 28 U.S.C. § 455(b)(3).

> He shall also disqualify himself . . . where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerned with the proceeding or expressed

> an opinion concerning the merits of the particular controversy .... 28 U.S.C. § 455(b)(3).

In *Mixon v. United States*, 620 F.2d 487 (5th Cir. 1980), the judgment was vacated and the case was remanded for further proceedings because the magistrate involved had represented the government in a previous proceeding.

The standard for disqualification because of previous government employment was set by Mr. Justice Rehnquist in *Laird v. Tatum*, 409 U.S. 824, 93 S. Ct. 7, 34 L. Ed. 2d 50 (1972):

> [in reference to a memorandum on disqualification] . . . a Justice Department official is disqualified if he either signs a pleading or brief or "if he actively participated in any case even though he did not sign a pleading or brief." I agree. In both *United States v. U.S. District Court for Eastern District of Michigan*, 407 U.S. 297, 92 S. Ct. 2125, 32 L. Ed. 2d 752 (1972), for which I was not officially responsible in the Department but with respect to which I assisted in drafting the brief, and in *S & E Contractors v. United States*, 406 U.S. 1, 92 S. Ct. 1411, 31 L. Ed. 2d 658 (1972), in which I had only an advisory role which terminated immediately prior to the commencement of the litigation; I disqualified myself. 93 S. Ct. 10.

In *Laird v. Tatum, supra*, Mr. Justice Rehnquist declined to disqualify himself as a former Justice Department official but he emphasized that he had had no intimate knowledge of the case. This was not the situation for Judge Wald as she was intimately and closely involved with Petitioner's complaint before the Department of Justice. Petitioner avers that Judge Wald should be held to the standard of disqualification set by Mr.

Justice Rehnquist above and that she should have recused herself.

II.

SHOULD A REVIEW PANEL RECUSE ITSELF WHEN IT PREJUDGES THE ISSUES AND CREATES THE APPEARANCE OF A CONSPIRACY TO CORRUPT THE FEDERAL COURT?

The District of Columbia Circuit is the most activistic federal circuit in the United States. If such a statement might be considered difficult to prove it would be far more difficult to find a more likely candidate. Activism of the judges means that a plaintiff will not receive the unbiased consideration of the issues of the case but that the verdict is a foregone conclusion to be in line with the known views of the judge.

For example, in 1965 Judge Bazelon, a judge of Petitioner's Review Panel, was then Chief Judge of the District of Columbia Circuit. At the same time he was Chairman of the Advisory Committee for the Model School Division of the District of Columbia public schools (Appendix I) and deeply involved in the fight against the track system and the other "inequities" of the schools.

Concurrently, Julius Hobson was also opposing the track system and the other "inequities" and filed suit against the School Board, the D.C. Board of Elections and against all of the judges of the federal District Court, thus forcing the case to go directly to the Court of Appeals where Judge Bazelon as Chief Judge would assign the single judge to hear the case as trial judge. He selected Judge J. Skelly Wright, whose views on this subject were well known (Appendix J). The result was a foregone conclusion and the decision of that judge

killed the track system in the District of Columbia schools and mandated other actions which threw the entire system into turmoil from which it has not yet recovered.

It is not for Petitioner here to argue whether such social changes should have been effectuated by the City Council of the District of Columbia, by the Congress of the United States or by a single judge. Petitioner's interest is that when Judge Wright was selected as the judge to hear the case, the result could have been predicted and Respondents were faced with a biased court with no hope of success regardless of the merits.

The same was true of Petitioner's case. When Judge Wald was assigned to the Review Panel the outcome was already indicated. Why else would the Panel order in the Attorney General of the United States, *sua sponte*, if not to support Respondents? Not only the facts of the case but the position of the Attorney General was well-known to Judge Wald (Appendix E) and, obviously, this information must have been given to the other members of the panel as it was the Review Panel which issued the order.

Oral argument on Petitioner's case was heard on February 14, 1980. On that date Petitioner was given notice of the *sua sponte* order of the court. At that time he was not aware of the connection of Judge Wald with the Office of the Attorney General or of her previous contact with the case.

On February 14, 1980, Petitioner was not aware that counsel for Respondents was largely responsible for the confirmation of Judge Wald as a judge. Not known to him was the fact that the strongest letter in support of Mrs. Wald at her Senate confirmation hearing was signed

by Messrs. Charles R. Work and Charles T. Duncan, partners of the law firm of Peabody, Rivlin, Lambert & Meyers, which firm appeared before the Review Panel as counsel for PRMSA, PRMMI, PRPA, TTT and TKM, Appellees in this case (Appendix H).

There was considerable opposition to Mrs. Wald's appointment as a judge, mainly because of her activist nature and it was feared that she would not be objective as a judge. Therefore, the letter signed by Messrs. Work and Duncan was a major contributing factor in her successful confirmation by the Senate.

The late discovery of a supporting letter from counsel for Appellees supporting the confirmation of Judge Wald provided the final link which created the appearance of a conspiracy to subvert the impartiality of the court. Petitioner now presents to this Court his complaint of the appearance of a conspiracy. (Note: Under 28 U.S.C. § 455 only the "appearance of partiality" has to be shown.)

The following scenario of events is proffered to the Court: By the summer of 1978 it was evident that Petitioner's case would go to the Court of Appeals of the District of Columbia Circuit. Respondents must have realized that they had a case on which a memorandum or opinion could not be written which would support their cause. The decision of the District Court on April 19, 1979, made this appeal a certainty.

Respondents' overt acts make the conclusion inescapable that they conceived the idea of having someone appointed to the bench who could be relied upon to support their case. Mrs. Wald was selected. Counsel for Appellees knew Mrs. Wald personally (Appendix H) and knew that the Attorney General had a strong interest in supporting the shipping monopoly of the Appellees

(Appendix E). Messrs. Work and Duncan were in a position to influence the selection of nominees as former presidents of the District of Columbia Bar. If the President of the United States could be induced to appoint Mrs. Juanita Kreps (a director of R. J. Reynolds Industries, Inc.) as Secretary of Commerce there should be no difficulty in getting Mrs. Wald nominated as a judge.

Thus the conspiracy was complete and the record shows that this is exactly what happened. Whether or not it happened for the above reasons is less important than the fact that it happened and the appearance of a conspiracy to affect the impartiality of the court was unmistakable.

The normal reaction of a newly appointed federal judge would have been to recuse herself when a case is assigned to her with which she had formerly been involved. She did not do so. Why? The only answer would be that her appointment was a part of a scheme and she had to carry out her part of the arrangement.

On this basis, the Review Panel and the Court of Appeals *en banc* were in error in denying petitioner's motions for reconsideration under 28 U.S.C. § 2106 and the "Fraud on the Court" Rule.

The error of the Review Panel in refusing to reopen on the basis of the "Fraud on the Court" Rule and 28 U.S.C. § 2106 applies to the trial court decision inasmuch as that decision was contrary to federal court decisions. A greater part of Petitioner's Opening Brief consisted of specific complaints which the Review Panel ignored by issuing an adverse *per curiam* decision without opinion or memorandum.

The opinions of a trial court judge must not be "based on mere speculation unsupported by the record. Findings by a trial judge unsupported by the record are evidence that the judge has relied on extra-judicial sources in making such determinations, indicating bias and prejudice. *Cf. United States v. Grinnell,* 384 U.S. 563, 87 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)." *Peacock Records, Inc. v. Checker Records, Inc.*, 430 F.2d 85, 89 (7th Cir. 1970). *See also Blizzard v. Fielding,* 454 F. Supp. 318 (D. Mass. 1978).

The decision of the trial court relied on the Business Review Letter which did not apply to any of the Respondents. Its other conclusions were also contrary to the record of the case.

III.

WHETHER WHEN THE ATTORNEY GENERAL OF THE UNITED STATES COMBINES WITH RESPONDENTS TO SUPPORT A SHIPPING MONOPOLY AND LENDS HIS SUPPORT TO AN APPARENT SCHEME TO CORRUPT THE FEDERAL COURTS THIS IS UNDUE INTERFERENCE OF THE JUDICIARY BY THE EXECUTIVE DEPARTMENT.

There is certainly the appearance of conspiracy when the Attorney General of the United States issues a Business Review Letter without requiring copies of any of the pertinent documents.

In order to issue the Business Review Letter of July 22, 1974, giving the green light to a proposed shipping monopoly which would be owned by a Puerto Rico government corporation and operated under a management contract with Sea-Land, the Office of the Attorney General had to ignore the procedures for such letters as set forth in 28 C.F.R. § 50.6.

Counsel for the Puerto Ricans misled the Attorney General by giving him a copy of the proposed authorizing act which would put the shipping company under the control of the Puerto Rico Development Administration, thus retaining the sovereign immunity of the Commonwealth of Puerto Rico. The counsel never gave the Attorney General a copy of the Act (P.R. No. 62) as signed by the governor on June 10, 1974, which set PRMSA up as an independent corporation, retaining no immunity of the Commonwealth. *See Star Lines, Ltd. v. PRMSA,* 451 F. Supp. 157 (S.D.N.Y. 1978), and *Cancel v. San Juan Construction Co.,* 387 F. Supp. 916 (D.P.R. 1974).

Also, counsel never gave the Attorney General a copy of the management agreement with Sea-Land authorized by PRMSA on July 9, 1974. This was a significant omission as the Attorney General only a few months earlier had opposed Sea-Land's efforts to acquire the United States Lines in *American Mail Line, Ltd. v. Federal Maritime Commission,* 503 F.2d 157, argued in February and decided on June 26, 1974. The Attorney General never asked for a copy of the Act as approved by the Puerto Rican legislature or of the management agreement.

Where one of the Respondents was able to have one of its directors appointed to be Secretary of Commerce at a time when it was threatened with a lawsuit that could cost it $200 million or more the scene was laid for the corruption of the Attorney General's office which was a stepping stone to the apparent corruption of the Federal Court of Appeals in which the office of the Attorney General itself played a role.

In itself the appointment of an Assistant Attorney General to a judgeship is a natural progression for the

more gifted attorneys in government service and many of our most eminent judges have come up by this route. The only danger is that such individuals may frequently find themselves sitting on cases with which they have been concerned while in the Justice Department. This has been recognized as such a problem that 28 U.S.C. § 455(a)(3) specifically requires recusal where the judge

> has served in governmental employment and in such capacity participated as counsel, advisor or expressed an opinion concerning the merits of the particular case in controversy.

Where counsel for Respondents is known to have been in contact with the Attorney General's office and other partners of that counsel's law firm are the principal supporters of Judge Wald before the Senate confirmation committee there is a clear connection which creates an appearance of conspiracy. When that judge declines to recuse herself then there is a clear indication of such a conspiracy and a purpose in this chain of events. Recusal becomes obligatory in order to preserve the integrity of the judicial system.

When this integrity is attacked with the active assistance and cooperation of the Department of Justice the fundamental principle of the separation of powers under the Constitution has been breached.

> The Constitution, in distributing the powers of government, creates three distinct and separate departments—the legislative, the executive, and the judicial. This separation is not merely a matter of convenience or of governmental mechanism. Its object is basic and vital, *Springer v. Philippine Islands,* 277 U.S. 189, 201, namely to preclude a commingling of these essentially different powers of government in the same hands . . . .

> If it be important thus to separate the several departments of government and restrict them to the exercise of their appointed powers, it follows as a logical corollary, equally important, that each department should be kept completely independent of the others . . . in the sense that the acts of each shall never be controlled by, or subjected, directly or indirectly, to the coercive influence of either of the other departments. James Wilson, one of the framers of the Constitution and a justice of this court, in one of his law lectures said that the independence of each department required that its proceedings "shall be free from the remotest influence, direct or indirect, of either of the other two powers." Andrews, The Works of James Wilson (1896), Vol. 1, p. 367. *O'Donoghue v. United States*, 289 U.S. 516, 530, 53 S. Ct. 74, 77 L. Ed. 845.

Where there has been such a gross involvement of the Attorney General in Petitioner's cause of action since 1974, a trial court decision contrary to the facts and to other case law and, finally, the appointment of a member of his staff to a judge who sits on and judges Petitioner's case a number of fundamental questions of law and the continued integrity of the court are raised. To the Petitioner the fundamental question is that he has been deprived of his day before an unbiased court and justice has been diverted.

CONCLUSION

Both in the failure of Judge Wald and the Review Panel to recuse themselves when all of the requirements of recusal both by statute and by case law have been met justice has been subverted and Petitioner has been denied

his due process under the law. Damage is done to the fabric of the law.

The conspiracy and the monopoly which have caused the bases of this Petition have denied access by the Petitioner to the shipping trade to Puerto Rico since 1973. Failure of the Petitioner in the face of an apparent corrupted court will prevent other entrepreneurs from attempting to enter the trade in the face of a shipping monopoly maintained by the Puerto Rican government.

For these and the other reasons set forth above, it is respectfully submitted that this Petition for Writ of Certiorari should be granted and that summary reversal, vacating of the lower decisions and remand to another circuit should issue.

Respectfully submitted,

JOHN R. IMMER, *PRO SE*
1638 19th Street, N.W.
Washington, D.C. 20009
(202) 265-1742

February 5, 1982

Appendix

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
September Term, 1981

No. 79-1658

[Filed: Oct. 2, 1981]

CARIBE TRAILER SYSTEMS, INC.,
JOHN R. IMMER,
Appellants

v. **Civil Action 78-0435**

PUERTO RICO MARITIME SHIPPING
AUTHORITY, *ET AL.*

BEFORE: Bazelon, Senior Circuit Judge; Wilkey and Wald, Circuit Judges.

ORDER

Upon consideration of appellant's (Immer) motion to reopen case on basis of "fraud on the Court rule" and to require recusal of appellate judge, it is

ORDERED, by the Court, that appellant's aforesaid motion to reopen case be and it is hereby, denied. And it is

FURTHER ORDERED, by the Court, that appellant's motion for recusal of the panel be and it is hereby, denied.

Per Curiam
FOR THE COURT:

/s/ George A. Fisher
Clerk

Circuit Judge Wald did not participate in the foregoing order.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
September Term, 1981

No. 79-1658

[Filed: Nov. 12, 1981]

CARIBE TRAILER SYSTEMS, INC.,
JOHN R. IMMER,
Appellants

v. CA 78-0435

PUERTO RICO MARITIME SHIPPING
AUTHORITY, *ET AL.*

BEFORE: Bazelon, Senior Circuit Judge; Wilkey and Wald, Circuit Judges.

ORDER

Upon consideration of appellant's (Immer) petition for rehearing, it is

ORDERED, by the Court, that appellant's aforesaid petition for rehearing is denied.

Per Curiam
FOR THE COURT:

/s/ George A. Fisher
Clerk

Circuit Judge Wald did not participate in the foregoing order.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
September Term, 1981

No. 79-1658

[Filed: Nov. 12, 1981]

CARIBE TRAILER SYSTEMS, INC.,
JOHN R. IMMER,
Appellants

v. CA 78-0435

PUERTO RICO MARITIME SHIPPING
AUTHORITY, *ET AL.*

BEFORE: Robinson, Chief Judge; Wright, Tamm, MacKinnon, Robb, Wilkey, Wald, Mikva, Edwards, and Ginsburg, Circuit Judges.

ORDER

The suggestion for rehearing *en banc* filed herein by appellant (Immer) having been transmitted to the full Court and no judge in regular active service having requested a vote with respect thereto, it is

ORDERED, by the Court, *en banc*, that appellant's aforesaid suggestion for rehearing *en banc* is denied.

Per Curiam
FOR THE COURT:

/s/ George A. Fisher
Clerk

Circuit Judge Wald did not participate in the foregoing order.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
September Term, 1979

No. 79-1658

[Filed: Feb. 13, 1980]

CARIBE TRAILER SYSTEMS, INC.,
Appellant,

v. **To be argued 2-14-80**

PUERTO RICO MARITIME
SHIPPING AUTHORITY,
Appellee.

ORDER

It is ORDERED by the Court, sua sponte, that the United States is made a party amicus curiae to this case and it is further

ORDERED by the Court, sua sponte, that a memorandum setting forth the views of the United States on the matters at issue before the Court be filed on or before February 25, 1980, with service on all parties.

Should counsel be so advised, responses to the memorandum of the United States may be made within ten days of its filing.

FOR THE COURT:

George A. Fisher, Clerk

/s/ Robert A. Bonner
Chief Deputy Clerk

APPENDIX D

DEPARTMENT OF JUSTICE
Washington, D.C. 20530

Assistant Attorney General
Antitrust Division

July 22, 1974

TEK:BJR;JJS;JHD
60-180-0

COPY

Miles W. Kirkpatrick, Esquire
Morgan, Lewis & Bockius
1140 Connecticut Avenue, N.W.
Washington, D.C. 20036

Dear Mr. Kirkpatrick:

This responds to your request that the Antitrust Division issue a business review letter with respect to proposed legislation originally entitled the "Puerto Rico Maritime Shipping Authority Act" and of the acquisition by the Commonwealth of Puerto Rico of the vessels and other assets and properties proposed therein. These would be acquired from the three lines presently engaged in service between the Commonwealth and the Mainland United States—Trans American Trailer Transport, Inc., Seatrain Lines, Inc., and Sea-Land Service, Inc.

In considering the request we have taken into account the statements and information in your letter of April 24, 1974, and the documents accompanying it, namely, the initial "Puerto Rico Maritime Shipping Authority Act," and a 5-page memorandum conderning the acquisition; the statements in your letter of May 21, 1974, and the revised proposed legislation accompanying that letter, your letter of May 29, 1974, your letter of May 30, 1974, your letter of June 7, 1974, the document described in your letter of May 29, 1974 as the proposed

plan of operation and the memoranda of understanding concerning Trans American Trailer Transport, Inc. (one agreement dated April 23, 1974), Seatrain Lines, Inc. (two memoranda dated March 28 and May 6, 1974) and Sea-Land Service, Inc. (two agreements both dated April 23, 1974).

On the basis of the statements and representations contained in the foregoing, and assuming the conditions therein continue to be substantially as described, the Antitrust Division has as of the date of this letter no intention of instituting a proceeding to challenge the proposed action.

Sincerely yours,

Thomas E. Kauper
Assistant Attorney General
Antitrust Division

APPENDIX E

UNITED STATES DEPARTMENT OF JUSTICE
Washington, D.C. 20530

June 6, 1975

TEK:JJS
60-384-110

Mr. John R. Immer
Chairman of the Board
Caribe Trailer Systems, Inc.
1638 19th Street, N.W.
Washington, D.C. 20009

Dear Mr. Immer:

The Department has reexamined its conclusion on the "state action" question raised by the establishment of a shipping monopoly by the Commonwealth of Puerto Rico. You had requested that we do this. In the course of our reconsideration, the Office of Legal Counsel, which is charged with rendering opinions to the heads of the various organizational units of the Department of Justice on questions of law arising in the administration of the Department (28 C.F.R. § 0.25(d)), and which is customarily consulted on questions of constitutional law, was asked for its views on the question. The Office of Legal Counsel concurred in our conclusion that for practical and statutory purposes the Commonwealth of Puerto Rico is regarded as a "state," and because of that determination, the exercise of its sovereign powers is within the scope of the "state action" doctrine enunciated in *Parker v. Brown.*

Accordingly, we must inform you that no change in our original conclusion on this question is warranted.

Sincerely yours,

Thomas E. Kauper
Assistant Attorney General
Antitrust Division

By: /s/ Joseph J. Saunders
Chief, Public Counsel and
Legislative Section

APPENDIX F

DEPARTMENT OF JUSTICE
Washington, D.C. 20530

November 28, 1977

Assistant Attorney General
Legislative Affairs

[Received: Dec. 5, 1977]

Honorable Bo Ginn
House of Representatives
Washington, D.C. 20515

Dear Congressman Ginn:

On behalf of the Attorney General, I would like to acknowledge receipt of your letter of November 18, 1977 concerning the letter of John R. Immer.

Because of its specific nature, I have referred your request to the Antitrust Division, Department of Justice, Washington, D.C., and asked them to reply directly to you.

If I may be of further assistance to you, please let me know.

Sincerely,

/s/ Patricia M. Wald
Assistant Attorney General

APPENDIX G

DEPARTMENT OF JUSTICE
Washington, D.C. 20530

Assistant Attorney General
Legisaltive Affairs

November 16, 1977

Honorable Claude Pepper
House of Representatives
Washington, D.C. 20515

Dear Congressman Pepper:

On behalf of the Attorney General, I would like to acknowledge receipt of your letter of November 10, 1977 concerning alleged antitrust violations in the shipping industry operating between Puerto Rico and the mainland United States.

We hope to be sending you a more detailed response soon.

Sincerely,

/s/ Patricia M. Wald
Assistant Attorney General

HOUSE OF REPRESENTATIVES, U.S.
November 18, 1977

MEMORANDUM

Dear Mr. Immer:

The attached refers to a subject in which you are interested, and is, therefore, referred for your information.

Yours very truly,

/s/ Claude Pepper
Member of Congress

Mr. John R. Immer
Chairman of the Board
Caribe Trailer Systems, Inc.
1638 19th Street, N.W.
Washington, D.C. 20009

APPENDIX H

LETTER SIGNED BY MESSRS. WORK AND DUNCAN IN SUPPORT OF MRS. WALD'S NOMINATION[1]

June 13, 1979

The Hon. Edward M. Kennedy
Chairman, Senate Judiciary Committee
Room 2226 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

The undersigned, the President, the President-Elect, and all of the past Presidents of the District of Columbia Bar in the active practice of law,[1] write in support of the nomination of the Honorable Patricia M. Wald to the United States Court of Appeals for the District of Columbia Circuit.

All of us know Mrs. Wald well and have worked with her on numerous occasions over the years. This letter is unsolicited; we write because we believe strongly that Mrs. Wald would be a truly outstanding jurist.

Mrs. Wald is widely known and respected as a brilliant lawyer. She has handled complex and important cases, both in trial and appellate courts. The list of these cases is too long to recount here, but suffice it to say that Mrs.

---

[1] The Honorable Louis F. Oberdorfer is now a member of the United States District Court for the District of Columbia.

---

[1] Hearings Before the Committee on the Judiciary, United States Senate, "Selection and Confirmation of Federal Judges, Serial No. 96-21, Part 2, pp. 193, 194.

Wald knows what goes on in a courtroom. Of course, she has an outstanding academic record.

Mrs. Wald has an excellent temperament. A number of us served with Mrs. Wald on the Bar's Board of Governors where discussions were often intense. In those moments, she was always an insightful, calming influence. She is always open-minded. She entertains thoughtfully and carefully the views of others. She is not doctrinaire or ideological in her approach to any problem.

Mrs. Wald has faithfully served our nation, our community, our courts and our Bar in many ways. We recommend her in the strongest possible terms to the United States Senate and urge her speedy confirmation.

ROBERT L. WEINBERG, President

JOHN W. DOUGLAS

JOHN H. PICKERING,
President-Elect

CHARLES T. DUNCAN

E. BARRETT PRETTYMAN

DANIEL A. REZNECK

CHARLES R. WORK

cc: Hon. Charles McC. Mathias
Hon. Birch Bayh

APPENDIX I

INVESTIGATION OF THE SCHOOLS AND POVERTY IN THE DISTRICT OF COLUMBIA

HEARINGS

BEFORE THE

TASK FORCE ON ANTIPOVERTY IN THE DISTRICT OF COLUMBIA

OF THE

COMMITTEE ON EDUCATION AND LABOR HOUSE OF REPRESENTATIVES

EIGHTY-NINTH CONGRESS

FIRST AND SECOND SESSIONS

ON

INVESTIGATION OF THE PUBLIC SCHOOL SYSTEM IN THE DISTRICT OF COLUMBIA AND ITS RELATION TO POVERTY

HEARINGS HELD IN WASHINGTON, D.C.
OCTOBER 7, 8, 12, 26, 27, 1965, AND JANUARY 13, 1966

Printed for the use of the Committee on Education and Labor
ADAM C. POWELL, *Chairman*

U.S. GOVERNMENT PRINTING OFFICE
55-278 O WASHINGTON : 1966

U.S. COURT OF APPEALS
Washington, D.C.

December 15, 1965

Hon. Adam Clayton Powell
Hon. Roman C. Pucinski
House of Representatives
Washington, D.C.

Gentlemen:

I do not address you in my capacity as chief judge of the U.S. Court of Appeals for the District of Columbia Circuit. For the past 14 months, I have been chairman of the advisory committee for the Model School Division of the District of Columbia public school system. I write to you in the hope that what I have learned in this position may be useful to your committee as it gathers information on the educational components of the antipoverty program. My comments, in which Dr. Herman Branson,[1] the advisory committee's vice chairman, joins, are only in part the result of our own experience. Much of the specific information I include has come to me through the work of the advisory committee's executive assistant, Miss Gail Saliterman, and the consultants who cooperated with us throughout this past year.

The schools which comprise the Model School Division are located in an area of the District of Columbia where

[1] Dr. Branson is chairman of the Physics Department, Howard University; director of the precollege program, Educational Services, Inc.; vice president of the Institute for Services to Education; consultant to the President's Panel on Educational Research and Development.

deprivation, poverty, school dropouts, and consequent unemployment contribute every day to that "combustible material" which James B. Conant says in his book, "Slums and Suburbs," may burst into a crime explosion on a scale we have not known.

Similarly, Kenneth Clark recently wrote in the New York Times magazine, "The Wonder Is There Have Been So Few Riots." Ours, he said, is a society where for many "the law itself has seemed an enemy," where thousands live in ghettoes "with no jobs or servile jobs, little education, broken families, delinquency, drug addiction, and a burning rage at a society that excludes them from the things it values most," and where their chilren are "subjected to criminally inefficient education in public schools they are required to attend * * *."

Our schools do not meet the needs of deprived people. Worse, they sometimes exacerbate rather than ameliorate. A study of Harlem youth indicated that * * *.

868

The programs submitted to the Office of Economic Opportunity or the Office of Education do not attack the basic reasons schools are failing to reach the deprived child. If Superintendent Hansen's commitments of June 1964 are to be realized, the school system must begin to develop the kinds of proposals it has avoided developing. It must commit resources to the development of curriculum which will make all children want to learn. It must come up with programs which change the way in which the institution operates. If certain procedures are antithetical to learning, where are the plans to try more flexible scheduling, new ways of distributing

supplies, and different methods for conferring status on teachers? Where are the research designs that seek alternatives to testing? Conspicuously absent are efforts to free the Model School Division from grading restrictions or testing and grouping children. Such steps cannot be lightly taken, but there are no committees or research groups of teachers and consultants even considering the questions together. Where are the plans to reduce the massive clerical tasks which inhibit the best teacher's ability to teach? What proposals have been made to utilize the wealth of talented amateurs who would like to work on a part-time basis?

Perhaps we were unrealistic in our expectations of broad innovation. But now that the issues are on the table, it will be inexcusable if the Model School Division limits itself to toying with teaching techniques and fails to implement projects that cut across all its schools. It will be inexcusable if the Model School Division does not become a place where teachers, guided by adequate in-service training, are freed and even encouraged to teach any of the new materials they want to teach. It will be inexcusable if the Model School Division does not become a center for real experimentation; new administrative controls, new systems for distributing supplies, new criteria for promotions. Only if we do all of this will we begin to confer status on those who most deserve status, the teachers; and only then will we begin to teach those who most need teaching.

Our school systems must change and we all have a role to play which is worth our best efforts. The Congress should continue to support the new programs and must demand that there be innovation. The school administrators must search until they find solutions to the many problems they face, even though this will mean altering

the very system they have created. They must make stronger efforts to rouse the public's concern when programs they feel necessary are turned down by the District Commissioners or the Congress. The District Commissioners must act as advocates for the citizens' needs, not judges given the task of dividing inadequate budgets among competing agencies. And the citizens must make it clear to everyone that they will no longer accept answers which do not begin to meet the problems.

Sincerely yours,

David Bazelon
Chairman, Advisory Committee
for the Model School Division

APPENDIX J

THE NEW YORK TIMES,

TUESDAY, JULY 19, 1966.

De Facto School Segregation Fought in Capital Suit

By BEN A. FRANKLIN

Special to The New York Times

WASHINGTON, June 18 — A Federal appeals judge began hearing today a suit that lawyers described as the first major attack on de facto pupil discrimination in a large American city. The suit is against the public school system in the District of Columbia.

At root, the suit is an attempt to have the Federal courts declare that de facto school segregation is just as discriminatory and unconstitutional as the deliberate, legislated segregation struck down by the United States Supreme Court 12 years ago.

If the courts accept this argument, one possible remedy would be a merger of predominantly Negro urban school systems with those of the predominantly white suburbs. In some of the largest cities there are not enough white students left to accomplish citywide integration by any other method.

De facto segregation is defined as segregation that results from housing patterns. It exists particularly in big cities.

Significant Gain Seen

Spokesmen for the Negro plaintiffs—a group of 18 parents and children and one teacher—said that a victory in their suit would represent "an advance as significant for the country as Brown v. Board of Education."

Brown v. the Board of Education of Topeka, Kan., was one of the five original school desegregation cases decided for the Negro plaintiffs in the Supreme Court's historic opinion of May 17, 1954. The school board here was also a defendant in that decision.

The Court's ruling then held that legal and administrative manifestations of discrimination against Negroes in the public schools constituted an unconstitutional denial of equal protection of the law and a denial of due process of law.

In Hobson v. Hansen, the case begun here today, the Federal courts are being asked to declare equally unconstitutional the "denial on account of race and color . . . of educational opportunities, advantages and facilities . . . equal to those afforded and available to white children."

The suit is based on the Fifth Amendment guarantee against the deprivation of life, liberty or property without due process of law.

The suit is expected to go to the United States Supreme Court for final determination.

The District of Columbia's school population of about 150,000 children is 94 per cent Negro, and the percentage of Negroes is increasing.

The 16-page complaint, filed last January by William M. Kunstler of New York, one of the country's most active civil rights lawyers, alleges that Dr. Carl F. Hansen, the Superintendent of Schools here, his staff and the city's school board, have "intentionally" discriminated against Washington's Negro students by means of the following:

¶The controversial "track system" under which pupils here at elementary and secondary school levels are placed in groupings according to ability.

¶Providing the city's few all-white or predominantly white schools with superior "plant, equipment, materials and curricula" and, in the case of some white schools, matching with public school board funds the private contributions of white parents for additional equipment and supplies.

¶Refusing to appoint and dismissing from "high administrative and policy-making positions in the District School System qualified Negroes, solely on account of their race and color."

¶Redrawing public school boundaries "so as to separate, segregate and exclude the infant [Negro] plaintiffs . . . from those schools."

¶Refusing or neglecting to demand from Congress, which governs this non-self-governing Federal enclave, adequate appropriations to stem "the decline of the quality of the . . . public school system . . . thereby purposely and wilfully creating racial discrimination and segregation in the public schools."

¶Failing, for all of these reasons, to prevent discrimination "based on economic poverty and deprivation."

Associated Press

Judge J. Skelly Wright is presiding in the case.

Suburban Comparison

The complaint also alleges that Negroes in Washington are receiving educational opportunities inferior to those offered in the contiguous school jurisdiction of Maryland and Virginia.

This was considered significant in view of the probability that a suburban merger remedy will be sought by the plaintiffs if the suit is upheld in the lower court.

The suit here was originally brought by Julius W. Hobson, a Negro economist for the Social Security Administration and the leader of a militant Washington civil rights group called ACT.

His initial aim was to challenge the constitutionality of the school board itself on grounds that its members are appointed by the judges of the United District Court here rather than elected.

This contention remains in the complaint and has caused unusual judicial complications. Because all 15 judges of the District Court for the District of Columbia are defendants in Mr. Hobson's suit, none of them could try the case.

Instead, the suit is being heard by Judge J. Skelly Wright of the United States Court of Appeals for the District of Columbia. Judge Wright, a former Federal district judge in New Orleans, is regarded as a liberal.

In a lecture at New York University School of Law in February, 1965, Judge Wright declared that "It is inconceivable that the Supreme Court will long sit idly by watching Negro children crowded into inferior slum schools while the whites flee to the suburbs to place their children in vastly superior, predominantly white schools."

Judge Wright suggested that the Court might require the merger of urban and suburban school systems to achieve an areawide racial balance.

In the opening testimony before Judge Wright today, Dr. Hansen acknowledged under questioning by Mr. Kunstler that at least 13 elementary schools here still had all-white teaching staffs.

Dr. Hanson explained that there were few if any faculty openings in the all-white or predominantly white schools because their student population was declining.

Federal courts have previously ruled against suits to end de facto segregation in Gary, Ind.; Kansas City, Mo., and Springfield, Mass. The Supreme Court has never ruled on the issue.

Opposition

LAW OFFICES
PEABODY, LAMBERT & MEYERS
A PROFESSIONAL CORPORATION
WASHINGTON, D.C. 20036

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CONNECTICUT BUILDING
1150 CONNECTICUT AVENUE, N.W.

TELEPHONE (202) 457-1000
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MARK D. COLLEY
NEIL D. KIMMELFIELD

OF COUNSEL
LEWIS A. RIVLIN
ROBERT C. HACKER
JORGE L. CÓRDOVA, JR.

WRITER'S DIRECT DIAL NUMBER

March 3, 1982

WAIVER

BY HAND

Mr. Alexander Stevas
Clerk
Supreme Court of the United States
One First Street, N.E.
Washington, D.C. 20543

Re: John R. Immer v. Puerto Rico Maritime Shipping Authority, et al., Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit, No. 81-1471

Dear Mr. Stevas:

This letter, submitted on behalf of all Respondents, concerns the above-referenced petition, which seeks review of the denial by the United States Court of Appeals for the District of Columbia Circuit of petitioner's motion to reopen a case in which all avenues of review had previously been exhausted.

The allegations that form the basis for Mr. Immer's current petition for a writ of certiorari were previously before the Supreme Court in March of 1981. Mr. Immer filed a petition for writ of certiorari (No. 80-843) on November 25, 1980, which petition was denied by the Court on February 23, 1981. On March 19, 1981, Mr. Immer submitted a petition for rehearing to the Court. That petition was based on a claim of "new evidence implicating respondents in a conspiracy to subvert and corrupt the federal courts." Petition for Rehearing, p. 4. The Court denied Mr. Immer's petition for rehearing on April 20, 1981. Subsequently, Mr. Immer filed a motion with the Court of Appeals seeking an order reopening the case on the basis of the purported "new evidence" and requiring the original panel to recuse itself. The motion was denied on November 12, 1981 and Mr. Immer filed the pending petition seeking review by the Supreme Court of the Court of Appeals ruling. The "new evidence" set forth in Mr. Immer's 1981 petition for rehearing is virtually identical to the allegations contained in Mr. Immer's pending petition for writ of certiorari.

In view of the fact that this case clearly does not warrant review by this Court, as demonstrated by the Court's previous denial of Mr. Immer's petition for rehearing, respondents waive their right to file a brief in opposition to the pending petition for writ of certiorari.

Very truly yours,

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cc: John Immer

Petitioner's Reply Brief

Office-Supreme Court, U.S.
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No. 81-1471

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

JOHN R. IMMER,

Petitioner,

v.

PUERTO RICO MARITIME SHIPPING AUTHORITY, *ET AL.*,

Respondents,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY TO RESPONDENTS' REPLY IN OPPOSITION

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March 19, 1982

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REPLY TO RESPONDENTS' REPLY IN OPPOSITION

STATEMENT OF THE CASF

Petitioner files this reply brief in response to a letter to the Clerk of this Court dated March 3, 1982, which letter purports to be merely a waiver of the right of all respondents to file a brief in opposition to Petitioner but, in actuality, is an argument against Petitioner's

position. Further, these particular respondents claim to be representing all respondents which is patently incorrect. Normally, a reply to such a letter of waiver would be inapposite but, in view of the contents thereof, it is incumbent upon Petitioner to respond. These points will be discussed *ad seriatum.*

The Petition for a Writ of Certiorari, complained of by certain of the Respondents (No. 80-843), was an action brought by Caribe Trailer Systems, Inc. and John R. Immer relating to questions raised under the Sherman Antitrust Act. The Court saw fit not to concern itself with those issues.

The present Petition for a Writ of Certiorari raises fundamental questions relating to the impartiality of the federal court and the appearance of corruption of that impartiality by Respondents, members of the Review Panel of the Federal Court of Appeals and by the Attorney General of the United States. These are more fundamental questions which strike at the heart of the federal judicial system and which need to be considered by this Court.

REASONS FOR GRANTING THE WRIT

The lack of response to the contentions made by Petitioner should remove all doubt or question as to the validity and the accuracy of the charges made. The lack of response by the Solicitor General constitutes an admission of the charges as there has been no claim of sovereign immunity for the charges levied.

I.

RESPONDENTS PURPORT TO REPRESENT THE ATTORNEY GENERAL OF THE UNITED STATES.

The letter in opposition filed on March 3 purported to represent all the Respondents. The first paragraph starts out:

> This letter, submitted on behalf of all Respondents, concerns the above referenced petition, which seeks review of the denial by the United States Court of Appeals for the District of Columbia Circuit of petitioner's motion to re-open a case in which all avenues of review had previously been exhausted. [Emphasis added.]

The last paragraph ends by saying:

> . . . respondents waive their right to file a brief in opposition to the pending petition for writ of certiorari.

Among the list of Respondents filed by the Petitioner was the Attorney General of the United States. According to 28 C.F.R. § 0.20 only the Solicitor General is authorized by law to represent the Attorney General in "petitions for or in opposition to certiorari."

Inasmuch as the letter filed by certain of the Respondents on March 3 did not include any signature or specific statement from the Solicitor General, the opening statement of Respondents must be false, or at the very best, an attempt to mislead the Court into believing that the letter did represent all Respondents to the Petition.

II.

THE ATTORNEY GENERAL DID NOT RESPOND TO THE PETITION.

Although service was made by mail on February 5, 1982, in conformance with Rule 28.3 of this Court, upon the Solicitor General by Petitioner, no brief in opposition or a letter waiving their right to file such a brief has been transmitted to the Court.

Such a failure to respond is either a direct violation of 5 U.S.C. § 702 or a refusal of the Solicitor General to offer any defense to the charges levied against the Attorney General by Petitioner. Such an act of *noblesse oblige,* in either case, violates the spirit of Section 702. This is an area in which Congress has expressed itself in unequivocable terms. Section 702, as amended by Pub. L. No. 94-574 (1976), provides in pertinent part:

> An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States . . . .

This position was maintained vigorously by the District of Columbia Circuit of the Court of Appeals in *Sea-Land Service, Inc. v. Alaska Railroad,* 659 F.2d 243 (1981):

> The Judiciary Committee of both Houses in their reports on the 1976 amendment, identified as the measure's clear purpose "elimin[ation of] the sovereign immunity defense in *all* equitable actions for specific relief against a federal agency, or officer acting in an official capacity." S. Rep. No. 996, 94th Cong., 2nd Sess. 8 (1976) (emphasis added); H.R. Rep. No. 1656, 94th Cong., 2nd Sess. 9

(1976) (emphasis added). The legislative history plainly reveals a congressional intent to strengthen Governmental accountability and dispel the confusion, uncertainty, and unfairness sovereign immunity defenses generated. See. S. Rep. No. 996 at 7; H.R. Rep. No. 1658 at 8.

Failing a defense of sovereign immunity the Attorney General stands in the position of tacitly admitting the correctness of Petitioner's contentions. Granting that the Attorney General (or the Solicitor General) has a considerable flexibility and discretion in deciding what suits to enter, he has no options in defending charges of illegal action levied against the top official of the Department of Justice or against the Department itself.

Stripped of the immunity of the sovereign he stands before this Court as an ordinary citizen. In the absence of any defense the charges of involvement of the Attorney General in the apparent conspiracy to corrupt the court must be given more credibility by the Court.

Admittedly, the Solicitor General is in a delicate situation in defending the Attorney General in this matter. In *Harris v. Rosario*, 446 U.S. 651, 100 S. Ct. 1929, 64 L. Ed. 2d 587, *reh. den.* 448 U.S. 912, 101 S. Ct. 27, 65 L. Ed. 2d 1173, the Solicitor General maintained before this Court that Puerto Rico is a territory, not a state, and is subject to the will of Congress. This view was upheld by this Court. The basic support for the decision of the trial court, which is the cause for the actions leading to this Petition, stated exactly the opposite, that Puerto Rico is a state where the Sherman Antitrust Act is concerned. In order to defend the Attorney General in this case he would have to reverse his position on the status of Puerto Rico and would also have to support the activism of the federal court complained of in the Petition.

III.

QUESTIONS RELATING TO CORRUPTION OF THE COURT OF APPEALS NOT PREVIOUSLY PUT BEFORE THE COURT.

Certain of the Respondents seek to convey the idea that the Court has previously considered the questions raised in the Petition now before the Court. They refer to an earlier petition submitted by Caribe Trailer Systems, Inc. and John R. Immer (No. 80-843) which was concerned only with questions relating to the Sherman Antitrust Act. The Petition for Rehearing of that case referred to related only to questions on the right of appellate review.

The present Petition arose out of the handling of the earlier issues by the Review Panel. It is a complaint against the Review Panel itself reflective of damage which has been done to the image of the impartiality of the court. Can a federal judge and a review panel ignore the provisions of federal court procedures established by the Congress of the United States to safeguard the integrity of that court system? It should not be a question of whether the Executive Department represented by the Attorney General should overtly interfere with the Judiciary. It seems now to be an issue of whether the Supreme Court will be subservient to that pressure or whether it will assert the position stated by Congress.

CONCLUSION

The assertion of certain of the Respondents of this case that the questions presented in this Petition are a repeat of the questions presented in a previous Petition are without foundation. The lack of response of the Respondents to the contentions of this Petition serves

to prove their validity and remove all doubt or question of the complaint as stated. Even the letterhead serves to prove that the two lawyers named, Messrs. Charles T. Duncan and Charles R. Work, are among the top listed partners of the legal firm representing certain of the Respondents.

For the above reasons it is respectfully submitted that this Petition for Writ of Certiorari should be granted and that summary reversal, vacating of the lower court decisions and remand to another circuit should issue.

Respectfully submitted,

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March 19, 1982